88-566

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JOSEPH F. SPANIOL, JR.
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CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 1987 TERM

ALBERT JOHN THAME, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Attorney for Petitioner

25 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the lower court err when failing to find that an otherwise lawful encounter between suspect and law enforcement officials was converted into a seizure without objective justification where the stop was based solely upon a drug courier profile, law enforcement officials were identified as drug agents, suspect identified himself and answered questions truthfully, but law enforcement officials repeatedly requested permission to search bag and did not notify suspect that he was in fact free to depart.

2. Did the lower court err when finding that the prosecutor's closing argument and rebuttal to the jury was not sufficiently harmless beyond a reasonable doubt, yet was not sufficiently major that a miscarriage of justice would result if the conviction was not reversed.

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PETITION FOR WRIT OF CERTIORARI
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Petitioner Albert John Thame, Jr., by and through his attorney, Robert F. Simone, Esquire, does respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINION OF THE COURT BELOW

The United States Court of Appeals for the Third Circuit, in United States v. Albert John Thame, Jr., No. 87-1623, a direct appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Criminal No. 87-00261), affirmed the judgment of sentence imposed following conviction for possession of cocaine with intent to distribute. Title 21, U.S.C., § 841(a)(1981).

The Court of Appeals held that Defendant's motion for suppression was properly denied; that the District Court's instruction as to the prosecutor's error in speculating about Defendant's intention to distribute cocaine on the street was adequately cured; that Defendant's post-arrest silence was not used against him in any prejudicial manner; and neither the prosecution's comment on Defendant's

assertion of Fourth Amendment right nor the introduction of evidence demonstrating that assertion were plain error requiring reversal.

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

On September 30, 1987, in the United States District Court for the Eastern District of Pennsylvania, Petitioner Albert John Thame, Jr., was adjudged guilty and convicted of possession with intent to distribute cocaine in violation of Title 21, U.S.C., § 841(a)(1), and sentenced to five years imprisonment, to be followed by a four year term of supervised release, a special assessment of $50.00, and a fine of $5,000, to be paid during the imposed term of supervised release. Appendix A. A timely Notice of Appeal was filed from Judgment of

Conviction and Sentence. Appendix B. On May 16, 1988, the Opinion of the United States Court of Appeals for the Third Circuit was filed. Appendix C. An Order issued from this Court on July 20, 1988 which extended the time for filing a petition for a writ of certiorari to, and including, August 14, 1988. Appendix D.

It is believed that Title 28, United States Code, Section 1254, does confer on this Court jurisdiction to review the judgment of the United States Court of Appeals for the Third Circuit in United States v. Albert John Thame, Jr., No. 87-1623.

CONSTITUTIONAL PROVISION WHICH THE CASE INVOLVES

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation particularly describing the place to be searched, and the person or things to be seized.

U.S. Constitution, Amendment IV.

STATEMENT OF THE CASE

Petitioner Albert John Thame, Jr., boarded an Amtrak train in Fort Lauderdale, Florida on May 21, 1987 and arrived at the 30th Street Station, Philadelphia, Pennsylvania, on May 22, 1987. Based solely upon items which the DEA listed as a drug courier profile, petitioner was approached by a team of DEA and Philadelphia law enforcement officers when he arrive in Philadelphia. At the time of petitioner's arrival, the government have no probable cause to suspect petitioner of having committed any offense.

The District Court conducted a suppression on Thame's motion. What happened when the train arrived in Philadelphia was seriously disputed at the suppression hearing. The version told by petitioner conflicts in important respects with

the version told by the law enforcement witnesses. The District Court, however, credited the testimony of the law enforcement witnesses and found the facts set forth in their testimony. The following factual account is based on that credited testimony.

Philadelphia Police Officer Michael McCue, assigned to the Drug Enforcement Agency, followed Thame up from the platform to the lobby of the 30th Street Station while DEA Special Agent John McCarty followed still further behind with Amtrak Investigator Doonan. In the lobby, McCue walked alongside Thame, identified himself, and asked if he could speak with Thame. Thame said that he did not mind. As they continued walking, McCue asked if he had just gotten off the train from Florida, and Thame said that he had. McCue then asked Thame his

name, and Thame replied "Albert Thame". McCue then asked if he could see his train ticket. At this point, the two stopped walking as Thame reached into his pocket and produced his train ticket, bearing the name "B. Kelly." Thame, in response to a question from McCue, explained that he was using the ticket of a friend who had to fly back. McCue then asked for identification, and Thame produced a driver's license and old police identification in his correct name. Agent McCarty then joined McCue and Thame and identified himself. McCue then handed the ticket and the identification to McCarty, who looked it over and handed it back to Thame. McCarty explained that they were working the Narcotics Interdiction Unit, seeking cooperation from passengers from source cities such as Miami and Fort Lauderdale, and asked if Thame would mind if McCue and McCarty

looked in the luggage Thame was carrying. Thame decline, stating that he had "sensitive material" in his bag. McCarty replied that that was fine, that he had an absolute right to refuse, but asked whether it would be okay if they conducted the search in a more private place. Thame again decline. McCarty then asked whether Thame would object to a sniff search of the air around the bag by a dog, as this would be less intrusive. Thame agreed. McCarty then asked if Thame would mind accompanying them to the Amtrak office, explaining that this would be more private and out of the way. Thame carried his own bag to the office. The entire conversation took about two minutes and the walk to the Amtrak police office took less than a minute. At the office, a sniff test search took place, and the indicated that there were drugs in Thame's bag. The sniff search was repeated in

another room. A search warrant was then obobtained, the bag opened, and cocaine was found. The District Court refused to suppress the cocaine.*

* Facts accepted by the Court of Appeals for the Third Circuit in Opinion of the Court, pp. 2-4.

I.

THE LOWER COURT DID ERR WHEN FAILING TO FIND THAT AN OTHERWISE LAWFUL ENCOUNTER BETWEEN SUSPECT AND LAW ENFORCEMENT OFFICIALS WAS CONVERTED INTO A SEIZURE WITHOUT OBJECTIVE JUSTIFICATION WHERE THE STOP WAS BASED SOLELY UPON A DRUG COURIER PROFILE, LAW ENFORCEMENT OFFICIALS WERE IDENTIFIED AS DRUG AGENTS, SUSPECT IDENTIFIED HIMSELF AND ANSWERED QUESTIONS TRUTHFULLY, BUT LAW ENFORCEMENT OFFICIALS REPEATEDLY REQUESTED PERMISSION TO SEARCH BAG AND DID NOT NOTIFY SUSPECT THAT HE WAS IN FACT FREE TO DEPART

The drug courier profile does not overcome a suspect's Fourth Amendment protections. United States v. McCaleb, 552 F2d 717 (6th Cir. 1977); United States v. Ballard, 573 F2d 1913 (5th Cir. 1978); United States v. Klein, 592 F2d 909 (5th Cir. 1979); United States v. Rico, 594 F2d 320 (2nd Cir. 1979); United States v. Cortez, 595 F2d 505 (9th Cir. 1979); United States v. Saperstein, 723 F2d 1221 (6th Cir. 1983); United States v. Sokolow, 831 F2d 1413 (9th Cir. 1987), cert. granted, No. 87-1295 (June 8, 1988).

No "quantum of individualized suspicion" was present to justify Thame's seizure. United States v. Martinez - Fuentes, 428 U.S. 543, 560 (1976).

Thame was seized within the meaning of the Fourth Amendment when drug agents informed him that they were working the Narcotics Interdiction Unit and repeatedly asked him that they might search his bag. United States v. Gonzales, 842 F2d 748, 751-752 (5th Cir. 1988).

Where Thame had identified himself and answered all questions truthfully, was not informed that he had a right to depart, the repeated requests by drug agents to perform a search of his bag, did lead Thame to believe that failure to cooperate would only lead to formal detention. United States v. Berry, 670 F2d 583, 597 (11th Cir. 1982)(en banc); United States v. Palen, 793 F2d 853,

857 (7th Cir. 1986).

No reasonable minded person would believe that he had the right to leave under the totality of the circumstances of this case. Terry v. Ohio, 392 U.S. 1 (1968); United States v. Mendenhall, 466 U.S. 544, 554 (1980), reh. denied, 448 U.S. 908 (1980); INS v. Delgado, 491 U.S. 502 (1983); Michigan v. Chesternut, 43 CrL 3077 (No. 86-1824, June 13, 1988).

Thame was being held detained illegally when he consent to subject his bag to a "sniff" test and that consent was tainted by the illegality and was ineffective to justify the search. Florida v. Royer, 460 U.S. 491, 507-508 (1983).

II.

THE LOWER COURT ERRED WHEN FINDING THAT THE PROSECUTOR'S CLOSING ARGUMENT AND REBUTTAL TO THE JURY WAS NOT SUFFICIENTLY HARMLESS BEYOND A REASONABLE DOUBT, YET WAS NOT SUFFICIENTLY MAJOR THAT A MISCARRIAGE OF JUSTICE WOULD RESULT IF IF THE CONVICTION WAS NOT REVERSED

Thame was denied his right to a fair trial by the prosecutor's argument and rebuttal that the jury could infer that Thame knew he had cocaine in his bag because he relied on his Fourth Amendment right and refused to consent to a search of that bag. Wainwright v. Greenfield, - U.S. - , 106 S.Ct. 634, 88 L.Ed. 2d 623 (1986); Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 48 L.Ed.2d 91 (1976); United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975); Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967 (1968); United States v. Taxe, 540 F2d 961, 969 (9th Cir. 1976), cert. denied, 429 U.S. 1040 (1977);

Jordan v. United States, 416 F2d 338, 344 (9th Cir. 1969).

Such error was not harmless where it went to the thrust of Thame's defense. United States v. Vaglica, 720 F2d 388 (5th Cir. 1983).

The government failed to carry the burden that the constitutional error was not prejudicial beyond a reasonable doubt. United States v. Branson, 756 F2d 752 (9th Cir. 1985).

The strength of the government's evidence was not so overwhelming that the jury's verdict would have been the same if there had been no prosecutorial misconduct. United States v. Jones, 482 F2d 747, 157 U.S.App. D.C. 158 (1973).

The claimed error not only seriously affected Thame's substantial right, but had an unfair prejudicial impact on the

jury's deliberations, United States v. Young, 470 U.S. 1, 16 n.14 (1985), especially when presented at the close of trial.

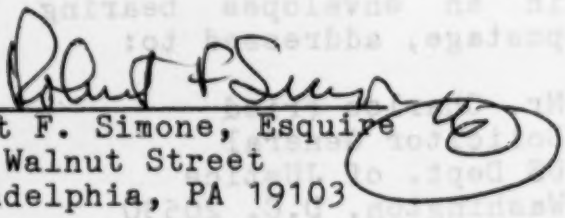
The lower court's finding that the error was not sufficiently minor to be harmless, yet not sufficiently major to conclude that a miscarriage of justice would result if the conviction was not reversed, was in itself error when the other combined evidence was not of such substantial nature as to be dispositive of guilt beyond a reasonable doubt.

The public reputation of judicial proceedings would be seriously damaged if Thame's conviction would be allowed to stand where the exercise of his Fourth Amendment right was placed as evidence before the jury to gain conviction.

CONCLUSION

For all the aforegoing, petitioner would pray that this Court issue a writ writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,



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Attorney for Petitioner

DECLARATION OF SERVICE BY MAIL

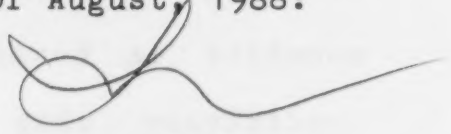
I, Leo R. Martinez, declare:

That I am a citizen of the United States and am employed in Denver County, CO; that my business address is 1461 Logan St., Suite A-1, Denver, Co 80203; that I am over the age of eighteen years, and am not a party to this action; that on August 13, 1988, I deposited in the US mails at the US Postal Service General Mail Facility, 1595 Wynkoop, Denver, CO 80217, three copies of Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, in an envelopes bearing the requisite postage, addressed to:

Mr. Charles Fried
Solicitor General
US Dept. of JUstice
Washington, D.C. 20530

Sally Mrvos
US Court of Appeals
for the Third Circuit
601 Market St., Rm. 21400
Philadelphia, PA 19106

at which place there is delivery by United States mail. I declare under penalty of perjury that the foregoing is true and correct. This 13th day of August, 1988:



Leo R. Martinez